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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-548

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

FILED NOVEMBER 6, 1974
PROBABLE JURISDICTION NOTED JANUARY 13, 1975

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Docket Entries

In the United States District Court for the Southern District of Mississippi Jackson Division

(Civil Action No. 4554)

Date	Filings—Proceedings
11-3-69	Complaint, original and ten copies, filed.
11-3-69	Applicant of Plaintiff for convening Three-Judge District Court, original and three copies, filed.
11-3-69	Summons, original and seven copies, copies having attached copy of complaint, issued and handed U.S. Marshal.
11-3-69	Copy of complaint and application for convening of three-judge court mailed Judge Walter L. Nixon, Jr.
11-12-69	Designation by Chief Judge John R. Brown of Circuit Judge Charles Clark and District Judges Harold Cox and Dan M. Russell, Jr., to hear and determine the cause. Filed and entered OB 1969, P. 1129-1130.
11-12-69	Copy of Designation and copy of complaint handed Sue for Judge Cox, mailed Judge Russell and Judge Clark.
11-28-69	Marshal's return on summons executed as to each and all defendants, filed.
12-11-69	Motion of Defendants for additional time within which to file answer with certificate of service, filed.
12-15-69	ORDER: Defendants granted additional thirty days from date of this order to file an answer. Filed and entered OB 1969, P. 1223. (copies mailed attorneys of record)
12-29-69	Letter from U.S. Attorney requesting issuance of alias summons to all defendants, filed.

Date	Filings—Proceedings
12-29-69	Alias Summons, original and five copies, copies having attached copy of complaint, issued and handed U.S. Marshal.
1-7-70	Marshal's return on summons executed as to Arny Rhoden, State Tax Commission, Jimmie Walker, Excise Tax Commissioner, Woodley Carr, Ad Valorem Commissioner, Kenneth Stewart, Director of Alcoholic Beverage Control Division, filed.
1-19-70	Motion of Defendants for a more definite statement with certificate of service, filed.
1-19-70	Notice of Motion of Defendants for a more definite statement for 2-20-70 at Jackson, Mississippi with certificate of service, filed.
5-12-70	ORDER: Motion for a more definite statement is overruled and prayer thereof denied. Defendants are granted an extension of time until 5-21-70 in which to answer. Filed and entered OB 1970, P. 715 (copies mailed attorneys of record)
5-21-70	Answer of defendants to complaint, with certificate of service, filed.
5-22-70	Copy of above Answer mailed Judges Russell and Clark, handed Anne Crews for Judge Cox
7-15-70	Interrogatories of Defendants to Plaintiff, filed.
8-12-70	ORDER: United States have additional time until 9-4-70 to answer interrogatories. Filed and entered OB 1970, P. 1121. (Copy handed U.S. Attorney, mailed Taylor Carlisle and Guy Rogers)
8-19-70	Interrogatories to Defendant Pursuant to Rule 33, Federal Rules of Civil Procedure, with Certificate of Service, filed.
9-8-70	Plaintiff's objections to Defendant's interrogatories, with certificate of service, filed.
9-8-70	Plaintiff's answer to Defendants' interrogatories with certificate of service, filed.

Date	Filings—Proceedings
10-5-70	Answer of Defendants to Interrogatories by Plaintiff with certificate of service and attached copy of letter, filed.
2-4-71	Defendants' Motion for Summary Judgment with Memorandum in Support thereof attached, with certificate of service, filed.
2-4-71	Defendants' Notice of Motion for Summary Judgment for hearing on 2-26-71 in Jackson, Miss., filed.
2-4-71	Defendants' Withdrawal of Certain Interrogatories Propounded to Plaintiff by Defendants, with certificate of service, filed.
2-4-71	Copy of defendants' Motion for Summary Judgment and attached Memorandum in support thereof handed Judge Cox, mailed Judges Russell and Clark.
9-22-71	Stipulation of Facts between Plaintiff United States of America and Defendants State Tax Commission of the State of Mississippi, et al, with attachments, filed.
9-22-71	Copy of above Stipulation mailed Judges Russell and Clark and copy handed Jean Nall for Judge Cox.
9-28-71	Plaintiff's Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment, with attached Plaintiff's Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment and In Opposition to Defendants' Motion for Summary Judgment, and certificate of service, filed.
9-28-71	Copies of above Motion and Memorandum mailed to Judges Russell and Clark and copy handed Jean Nall for Judge Cox.
9-29-71	Defendant's opposition to plaintiff's Cross-Motion for Summary Judgment with certificate of service, filed. (Copy handed Judge Cox.

Date	Filings—Proceedings
	Copies mailed Judges Dan M. Russell and Judge Charles Clark ON 9/30/71).
3–24–72	OPINION: Defendants are entitled to summary judgment on all issues, filed. (Judge Charles Clark) (Copies mailed attorneys of record) (Memo to J. Nall)
3–24–72	SPECIAL CONCURRING OPINION: . . . The complaint in this case is without merit and should be dismissed without prejudice without any assessment of cost, filed. (WHC) (Copies mailed all attorneys of record) (Memo to J. Nall)
3–30–72	JUDGMENT: the complaint in the captioned case is without merit and is dismissed with prejudice without any assessment of costs, filed and entered OB 1972, Page 401 (Charles Clark, DMR, WHC) (Copy mailed attorneys; copy handed Judge Cox and mailed Judges Russell and Clark) (Memo to J. Nall & J. Speights)
3–30–72	Final J.S. 6 Card.
5–1–72	Plaintiff's Notice of Appeal to Supreme Court of the United States from final judgment of 1–30–72, with certificate of service, filed. (Certified copy mailed Supreme Court)
12-4-72	Cert. copy of Order of Supreme Court of U.S.: the statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted, filed and entered OB 1972, Page 1425.
6-8-73	Slip Opinion of Supreme Court of U.S.: judgment of District Court is vacated and case remanded for further proceedings consistent with this opinion . . . It is so ordered, filed.
6-8-73	J.S. 5 Card.

7-6-73	Certified copy of JUDGMENT OF U.S. SUPREME COURT: judgment of District Court is vacated with costs and cause remanded for further proceedings in conformity with opinion of this Court; further that U.S. recover from State Tax Commission, et al $578.00 costs, filed and entered OB 1973, page 1036.
11-2-73	EXHIBIT: Gov't No. 1, filed.
6-12-74	OPINION rendered by Circuit Judge CLARK, on hearing before Judges Clark, Russell & Cox filed. (Copy handed U.S. Attorney, mailed other attorneys of record) (Judge Clark's office stated to Mr. Thomas that copies have been furnished to Judges Cox and Russell)
6-26-74	Copy of Opinion mailed West Publishing Company.
7-12-74	JUDGMENT: Pursuant to opinion of three-judge court, which is adopted and made a part hereof by reference thereto, it is ordered that claim of the U.S. is without merit and complaint is in its entirety dismissed with prejudice without any assessment of costs. Ordered by express authority of the other two judges on this panel, as managing judge herein, filed and entered OB 1974, page 1031. (Copies mailed all attys. of record and William H. Frake, Robert L. Wright, William G. Clark and Judges Clark and Russell)
7-12-74	FINAL JS 6 CARD FILED.
8-8-74	Plaintiff's Notice of Appeal to Supreme Court of the United States from Final Judgment of 7–12–74, with Certificate of Service, filed.

A true copy, I hereby certify.

ROBERT C. THOMAS, *Clerk.*

By: /s/ S. CARTER,

Deputy Clerk.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, Chairman; JIMMIE WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI,
DEFENDANTS.

[Filed November 3, 1969]

COMPLAINT

The United States of America alleges the following:

1. The Court has jurisdiction of this action under 28 U.S.C. 1345.

2. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

3. The lands comprising Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base and the Meridian Naval Air Station were purchased by the United States with the consent of the State of Mississippi.

4. The State of Mississippi ceded to the United States and the United States accepted exclusive jurisdiction over the lands comprising Keesler Air Force Base and the United States Naval Construction Battalion Center; and Keesler Air Force Base and the United States Naval Construction Battalion Center are situated on lands over which the United States has exclusive jurisdiction.

5. The State of Mississippi ceded to the United States

and the United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station; and Columbus Air Force Base and the Meridian Naval Air Station are situated on lands over which the United States and the State of Mississippi have concurrent jurisdiction.

6. The Officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmens' Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—Closed, Chief Petty Officers' Mess—Open, Enlisted Men's Club, and the Navy Exchange Department of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—Open, the Commissioned Officers' Mess—Closed, the Commissioned Officers' Mess—Open, the Navy Exchange Enlisted Mens' Club, and the Centralized Package Store at Meridian Naval Auxilliary Air Station are Instrumentalities of the United States operating with nonappropriated funds, are entitled to the sovereign immunities and privileges of the United States, are located in the State of Mississippi and are or have been engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned. These agencies are referred to hereinafter as "Instrumentalities of the United States."

7. Under its enumerated powers concerning regulation of land and naval forces and military reservations pursuant to Art. I, Sec. 8, Cl. 14 of the Constitution of the United States, the Congress, in Section 6 of the 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473, authorized the Secretary of Defense "to make such regulations as he may deem appropriate governing the sale, consumption, possession of or traffic in • • • intoxicating liquors to or by members of the Armed Forces at or near any camp • • • or other place primarily occupied by members of the Armed Forces • • •".

8. Pursuant to the above cited authority, the Secretary of Defense issued Department of Defense Directive 1330.15 dated 4 May 1964, 32 CFR 261.4(c). This Directive requires that the purchase of all alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within

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the United States shall be in such a manner and under such conditions as shall obtain for the Government of the United States the most advantageous contract, price and other factors considered.

9. The Armed Services Procurement Act, 10 U.S.C. 2305(c) requires that a contract be granted to the bidder whose bid "will be the most advantageous to the United States, price and other factors considered." Although the Act applies only to appropriated fund activities of the Armed Services of the United States, its requirement that procurement be at the most advantageous price has been adopted by the Secretary of Defense in said Directive as the governing procurement policy for the aforesaid Instrumentalities of the United States.

10. The Directive and procurement policy adopted from the Act referred to in Pars. 8 and 9 hereinabove require the aforesaid Instrumentalities of the United States engaged in the purchase of alcoholic beverages for resale to obtain said alcoholic beverages at the lowest competitive price most advantageous to the United States.

11. The State of Mississippi Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265-01 et seq., enacted July 1, 1966, imposes strict regulatory control on the possession and sale of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

12. Sec. 10265-01 et seq. of the Mississippi Code (1942) Annotated, was enacted after the United States obtained jurisdiction over the lands upon which the aforesaid Instrumentalities of the United States are situated, all as described in paragraphs 4 and 5 hereinabove.

13. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission promulgated Regulation No. 22 entitled "Sales to Military Post Exchanges, etc., effective September 1, 1966," hereinafter referred to as Regulation 22, which attempts to regulate, tax and control Instrumentalities of the United States located in the State of Mississippi, which are engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned.

14. Regulation 22 requires the aforesaid Instrumentalities of the United States to order alcoholic beverages direct from the distiller and/or supplier or to purchase them from the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

15. Regulation 22 further requires the aforesaid Instrumentalities of the United States to pay a seventeen percent "mark-up" on distilled spirits and a twenty percent "mark-up" on wine, whether purchases are made directly from the distiller or from the Alcoholic Beverage Control Division of the Mississippi State Tax Commission. These "mark-ups" are percentages of the normal wholesale purchase price and are added on to such purchase price.

16. When purchasing alcoholic beverages from distillers or suppliers, the State of Mississippi requires the aforesaid Instrumentalities of the United States to pay the aforementioned "mark-ups" to the distillers and/or suppliers and said distillers and/or suppliers to collect said "mark-ups" and in turn remit them directly to the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

17. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission requires that the "mark-ups" be paid by the aforesaid Instrumentalities of the United States when making purchases directly from distillers and/or suppliers although the State does not handle the merchandise in connection with such purchases, does not provide any facilities, and does not perform any services in connection with such purchases, the net result of Regulation 22 being that the so-called "mark-ups" are in fact taxes.

18. The Alcoholic Beverage Control Division of the Mississippi State Tax Commission is not a party to purchases by the aforesaid Instrumentalities of the United States from distillers and/or suppliers.

19. Regulation 22 requires distillers and/or suppliers which sell alcoholic beverages to the Instrumentalities of the United States located in the State of Mississippi, to strictly observe said regulation and any distiller and/or supplier who fails or refuses to strictly observe Regulation 22 is considered to have violated the Alcoholic Beverage Control Laws of the State of Mississippi and is promptly deprived of the benefits of same including the right to sell

his products to the Alcoholic Beverage Control Division, the sole authorized wholesaler in the State of Mississippi; and in addition thereto he may be prosecuted for violation thereof and subjected to criminal penalties therefor. As a result distillers and/or suppliers, fearful of losing the opportunity to sell their products to the agencies of the State of Mississippi and fearful of criminal prosecution, have refused and continue to refuse to sell their products to the aforesaid Instrumentalities of the United States without collecting from these Instrumentalities the so-called "mark-up" percentages and remitting them to the said Division.

20. As a condition for doing business in the State of Mississippi distillers and/or suppliers are required to furnish the Alcoholic Beverage Control Division of the State a price list and to agree not to sell to any of the aforesaid Instrumentalities of the United States at a lower price than to the State of Mississippi.

21. Defendants have sought to require each of the aforesaid Instrumentalities of the United States to obtain an alcoholic beverage permit from the Alcoholic Beverage Control Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi.

22. Defendants are prohibited by the Federal Constitution from regulating, taxing and otherwise controlling the procurement of liquor by Instrumentalities of the United States located in the State of Mississippi.

23. The aforesaid Instrumentalities of the United States have made these "mark-up" payments under protest to the Alcoholic Beverage Control Division of the Mississippi State Tax Commission either directly or indirectly through distillers and/or suppliers in an amount in excess of $319,740.51 since September 1966 and continue to do so under protest.

24. The acts of the defendants aforementioned have caused damage to the aforesaid Instrumentalities of the United States in an amount in excess of $319,740.51 and will continue in a proportionate amount or more for the foreseeable future. Such sums paid and to be paid legally belong to the aforesaid Instrumentalities of the United States and not to defendants and the collection thereof constitutes an unjust enrichment to the defendants at the

expense of the aforesaid Instrumentalities of the United States.

25. Regulation 22, as applied to purchases by the aforesaid Instrumentalities of the United States, is illegal and void and is prohibited by the Constitution of the United States because: (a) it is in conflict with the procurement policy established for Instrumentalities of the United States by the Secretary of Defense pursuant to authority vested in him by an Act of Congress; (b) it invades and interferes with the exercise of powers expressly delegated by the Constitution of the United States to the Congress; (c) it infringes the Federal Government's immunity from taxation by the States; and (d) the State of Mississippi is without jurisdiction to apply its laws to the lands upon which the aforesaid Instrumentalities of the United States are situated.

WHEREFORE, the United States respectfully prays that:

1. In accordance with 28 U.S.C. 2284(1), this Court immediately notify the Chief Judge of the United States Court of Appeals for the 5th Circuit that this is an action to restrain the enforcement of an order made by an administrative board or commission acting under state statutes upon the ground of unconstitutionality within the meaning of 28 U.S.C. 2881, and request him to designate two other judges, at least one of whom shall be a Circuit Judge, to serve as members of the Court to hear and determine this action.

2. Upon hearing of this action, Regulation 22 be declared null and void and defendants, their officer, agents, servants, employees, attorneys, and those persons in active concert or participation with them, be enjoined and restrained from regulating, taxing or controlling purchases of alcoholic beverages by Instrumentalities of the United States, aforementioned hereinabove, located in the State of Mississippi, either directly or indirectly through distillers and/or suppliers doing business with the United States.

3. Upon hearing of this action, there be a judgment in favor of the United States of America and against all defendants jointly and severally in the sum of $319,740.51 with interest according to law until paid, which sum has heretofore been paid under protest to defendants directly or indirectly as alleged; and there be a further judgment

in favor of the United States of America and against defendants jointly and severally in a sum certain equal to the amount which the aforesaid Instrumentalities of the United States may pay in the future to defendants under protest directly or indirectly in excess of the $319,750.51 already paid to date as stated hereinabove.

/s/ Robert E. Hauberg
United States Attorney
/s/ Joseph E. Brown, Jr.
Assistant United States Attorney

VERIFICATION

City of Washington
District of Columbia } ss

Major Thomas V. Ball, being duly sworn, deposes and says:

That he is an air force officer on active duty, assigned to the Office of the Judge Advocate General, United States Air Force; that he is authorized to act herein and to make verification on behalf of plaintiff herein; that in accordance with the duties of his office, he has read the foregoing complaint and that the matters therein alleged are true as affiant is informed and verily believes.

/s/ Major Thomas V. Ball

Subscribed and sworn to before me this 14th day of October, 1969.

/s/ Audrey Anne Crump
Notary Public
My commission expires Aug. 31, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed November 3, 1969]

[TITLE OMITTED IN PRINTING]

APPLICATION FOR CONVENING OF THREE-JUDGE DISTRICT COURT

Plaintiff, the United States of America, upon the complaint heretofore filed, hereby makes application for hearing of this cause and of the plaintiff's motion for a permanent injunction herein before a three-judge district court as required by Section 2284(1), Title 28, United States Code, and requests that the Chief Judge of the United States Court of Appeals for the Fifth Circuit be notified pursuant to Section 2284, Title 28, United States Code, of presentation of plaintiff's application for injunction in order that necessary designation of judges for said Court may be made.

/s/ Robert E. Hauberg
United States Attorney

/s/ Joseph E. Brown, Jr.
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed May 12, 1970]

[TITLE OMITTED IN PRINTING]

ANSWER

Come now all of the Defendants in this cause and file their Answer to the Complaint exhibited against them.

I.

The Defendants admit the allegations contained in Paragraph 1 of the Complaint.

II.

The Defendants admit the allegations contained in Paragraph 2 of the Complaint.

III.

The Defendants admit the allegations contained in Paragraph 3 of the Complaint.

IV.

The Defendants deny the allegations contained in Paragraph 4 of the Complaint.

V.

The Defendants admit the allegations contained in Paragraph 5 of the Complaint.

VI.

The Defendants admit that the clubs named in Paragraph 6 of the Complaint operated with non-appropriated funds, are located in the State of Mississippi, are engaged in the purchase of alcoholic beverages for resale, but deny that they are operated as instrumentalities of the United States and are thereby entitled to the sovereign immunities and privileges of the United States.

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VII.

The Defendants admit that *50 USC App. 473* authorizes the Secretary of Defense to make regulations but denies that the statute authorizes the Secretary of Defense to make any regulations concerning intoxicating liquors that require conduct in violation of state law.

VIII.

The Defendants admit that Department of Defense Directive No. 1330.15, dated 4 May 1964, 32 CFR 261.4(c), has been issued but deny that it can be interpreted to authorize the purchase of alcoholic beverages for resale at any location within the United States without violating the Twenty-First Amendment to the United States Constitution.

IX.

The Defendants admit the allegations in the first sentence of Paragraph 9 of the Complaint but deny that the Secretary of Defense has the authority to extend the provisions of the Armed Services Procurement Act to the procurement of alcoholic beverages with non-appropriated funds. The Defendants also deny that the military bases referred to in the Complaint are instrumentalities of the United States.

X.

The Defendants deny the allegations of Paragraph 10 of the Complaint.

XI.

The Defendants admit the allegations of Paragraph 11 of the Complaint.

XII.

The Defendants admit the allegations of Paragraph 12 of the Complaint but deny that the clubs referred to in Paragraphs 4 and 5 of the Complaint are instrumentalities of the United States.

XIII.

The Defendants admit the allegations of Paragraph 13 of the Complaint but deny that Regulation 22 attempts to regulate tax and control instrumentalities of the United States located in the State of Mississippi, which are engaged in the purchase of alcoholic beverages for resale to authorized personnel prescribed by the Secretaries of the Military Departments concerned.

XIV.

The Defendants admit that Regulation 22 requires clubs to purchase alcoholic beverages direct from the distiller and/or supplier or to purchase them from the Alcoholic Beverage Control Division of the State Tax Commission but denies that the clubs are instrumentalities of the United States.

XV.

The Defendants admit the allegations of Paragraph 15 of the Complaint but deny that the clubs are instrumentalities of the United States.

XVI.

The Defendants admit the allegations of Paragraph 16 of the Complaint but deny that the clubs are instrumentalities of the United States.

XVII.

The Defendants deny the allegations of Paragraph 17 of the Complaint.

XVIII.

The Defendants deny the allegations of Paragraph 18 of the Complaint.

XIX.

The Defendants deny the allegations of Paragraph 19 of the Complaint.

XX.

The Defendants deny the allegations of Paragraph 20 of the Complaint.

XXI.

The Defendants admit the allegations of Paragraph 21 of the Complaint.

XXII.

The Defendants deny the allegations of Paragraph 22 of the Complaint.

XXIII.

The Defendants deny the allegations of Paragraph 23 of the Complaint.

XXIV.

The Defendants deny the allegations of Paragraph 24 of the Complaint.

XXV.

The Defendants deny the allegations of Paragraph 25 of the Complaint.

XXVI.

The Defendants deny that the Plaintiff is entitled to any relief, injunctive or otherwise, based on the allegations of the Complaint and deny that the Plaintiff is entitled to a judgment against the Defendants, jointly or severally, in the sum of $319,740.51, or in any amount.

Respectfully submitted this the 21st day of May, 1970.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, Chairman; JIMMY WALKER, Excise Commissioner; WOODLEY CARR, Ad Valorem Commissioner; KENNETH STEWART, Director of the Alcoholic Beverage Control Division, Mississippi State Tax Commission; A. F. SUMMER, Attorney General, State of Mississippi; and the STATE OF MISSISSIPPI, Defendants.

By: /s/ Guy N. Rogers
GUY N. ROGERS,
Assistant Attorney General
One of the Attorneys for Defendants

/s/ Taylor Carlisle
TAYLOR CARLISLE,
Attorney for the State Tax Commission

/s/ James E. Williams
JAMES E. WILLIAMS,
Attorney for the State Tax Commission

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed September 8, 1970]

[TITLE OMITTED IN PRINTING]

PLAINTIFF'S ANSWER TO DEFENDANTS' INTERROGATORIES

Major David M. Lewis, Jr., an Air Force officer, assigned to the Litigation Division of the Office of the Judge Advocate General, United States Air Force, being duly sworn, deposes and says that the following Answers to Defendants' Interrogatories are true to the best of his knowledge, information and belief.

• • • • •

3. As to each of the fourteen alleged federal instrumentalities named in paragraph 6 of the complaint:

(a) When were each of these clubs established and by what authority?

ANSWER: (1) *Keesler Air Force Base:* Under the authority of Air Force Manual 176-3, Airmen's Open Mess, established January 12, 1951; Officers' Open Mess, established December 7, 1941; NCO Open Mess, established July 4, 1946.

(2) *Columbus Air Force Base:* Although available records do not provide a specific date, the Officers' Open Mess, and the Noncommissioned Officers' Open Mess, were established sometime between 1951 and 1956 under the authority of Air Force Manual 176-3.

(3) *United States Naval Construction Battalion Center:* The Commissioned Officers' Mess (Closed), established April 29, 1966, in accordance with authority granted by the Chief of Naval Personnel by letter reference PERS-G12 MEB, March 30, 1966; Chief Petty Officers' Mess (Open), established July 18, 1966, in accordance with authority granted by the Chief of Naval Personnel by letter, reference PERS-G12 MEB dated July 18, 1966; Navy Exchange Package Store, established October 20, 1967, in accordance with authority granted by the Secretary of the Navy by letter

dated October 20, 1967; Enlisted Men's Club, established as an integral part of the Navy exchange, February 21, 1967, in accordance with the Navy Exchange Manual.

(4) *Naval Air Station, Meridian:* Enlisted Men's Club, established in 1961 on the approval of the Navy Resale System Office; Chief Petty Officers' Mess, established April 1961; Commissioned Officers' Mess (Open), established October 6, 1960, by authority of the Chief of Naval Personnel. The Commissioned Officers' Mess (Closed) purchases no liquor independently and procures wine from the Commissioned Officers' Mess (Open). The Centralized Package Store was discontinued in 1967.

• • • • •

(e) Is club membership confined to members of the Armed Forces on active duty or does it include members of the Reserve Components, Reserve and National Guard, and retired members of the Armed Forces and of the Reserve Components?

ANSWER: (1) *Keesler Air Force Base:* Membership can be obtained in the Officers' Open Mess by active duty personnel and their widows, and by retirees and their widows. Membership is not available to retired reservists. Members of the National Guard and reservists can apply for membership, but their applications must be approved on an individual basis by the Advisory Council before becoming a member.

Membership can be obtained in the NCO Open Mess by active duty personnel and their widows, retirees and their widows, and by retired reservists and their widows. Memberships are not available to members of reserve components or the National Guard.

Membership can be obtained in the Airmens' Open Mess by active duty personnel and their widows, and by personnel (and their widows) medically retired from active duty. Those who cannot obtain membership in the Airmens' Open Mess are members of reserve components and the Reserve and National Guard. All enlisted personnel in Grades E-1 to E-3 of all services in temporary duty, detached duty, or in transit status at Keesler Air Force Base can become Associate Members.

(2) *Columbus Air Force Base:* The Officers' and NCO Clubs both allow membership to personnel of Reserve units not on active duty and to retired members of the Armed Forces.

(3) *Naval Construction Battalion Center:* The Commissioned Officers' Mess (Closed), the Chief Petty Officers' Mess (Open), and the Navy Exchange Package Store do not operate on a membership basis as such. The privileges and services of each instrumentality are available depending upon the status of the individual concerned as determined by Naval Regulations, Directives, Instructions and Manuals. The services and privileges of each instrumentality are available to members of reserve components and National Guard on active duty for 72 hours or more, and to retired members of the Armed Forces on the retired list with pay, including members of the Fleet Reserve and Fleet Marine Corps Reserve on active duty. Inactive reserve personnel performing scheduled periods of inactive duty training drills do not have Package Store privileges.

(4) *Naval Air Station, Meridian:* Enlisted Men's Club membership is open to personnel of the Armed Forces on active duty, reserve components, reserve and National Guard and retired military personnel.

The CPO Mess membership is open to all Chief Petty Officers on active duty stationed at the Naval Air Station at Meridian.

Commissioned Officers' Mess (Open) membership is limited to members who are either active duty military, retired military, officers of the U.S. Environmental Science Services Administration and the U.S. Public Health on active duty or on the retired list with pay, or unremarried widows of officers of the Armed Forces of the United States who died while on active duty or on retired list with pay.

• • • • •

(h) Are the clubs open to any persons other than military personnel?

ANSWER: In addition to those members listed in the Answer to Interrogatory 3(e) above, clubs are open to their dependents and guests. However, guests are

not allowed to make any purchase or share in any expense incurred by their hosts.

• • • • •

(s) When did the clubs commence purchasing alcoholic beverages for resale in packaged form?

ANSWER: (1) *Keesler Air Force Base:* The Package Store which operates under the Officers' Open Mess began operation in November 1956; the Package Store which operates under the NCO Open Mess began operation in November 1957; the Airmens' Open Mess never has had a package store operation.

(2) *Columbus Air Force Base:* The Officers' Club and the NCO Club commenced purchasing alcoholic beverages for resale in package form in January 1957.

(3) *U. S. Naval Construction Battalion Center:* The Chief Petty Officers' Mess (Open) commenced purchasing alcoholic beverages for resale in packaged form after April 17, 1970. (the Secretary of the Navy had previously authorized the establishment of such sales outlets at the Naval Construction Battalion Center by letter dated October 20, 1967); the Navy Exchange Package Store commenced purchasing alcoholic beverages for resale in packaged form during November 1967 and commenced selling alcoholic beverages in packaged form during December 1967; the Commissioned Officers' Mess (closed) and the Enlisted Mens' Club do not purchase alcoholic beverages, other than beer, for resale in packaged form.

(4) *Naval Air Station, Meridian:* The Enlisted Mens' Club has purchased liquor for resale in packaged form since 1961; the CPO Mess was authorized to resume individual package store sales on September 6, 1968 (club records do not show authorization prior to that date); the Commissioned Officers' Mess (Open) purchased alcoholic beverages for resale in packaged form from March 1, 1962, to March 31, 1967 and commenced the sale of packaged liquor again on August 30, 1968.

• • • • •

(x) Were sales confined to members of the United States Armed Forces?

ANSWER: In accordance with applicable regulations, sales were generally confined to active duty personnel

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and their widows, and retirees and their widows of the United States Armed Forces, and in exceptional circumstances, to military personnel of foreign armed forces stationed at the installation for training purposes.

• • • • •

/s/ David M. Lewis, Jr.
DAVID M. LEWIS, JR.
Major, United States Air Force,
Litigation Division, Office of the
Judge Advocate General, USAF.

Subscribed and sworn to before me this 2nd day of September, 1970.

/s/ Angeline Johns
Notary Public

My Commission expires April 14, 1972

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed February 4, 1971]

Now come the defendants herein by their attorneys and move the Court for an entry of a summary judgment dismissing the complaint with prejudice pursuant to Rule 56 of the Federal Rules of Civil Procedure. The grounds of the motion are that the admissions on file in the complaint and in the plaintiff's answers to interrogatories show that there is no genuine issue as to the material facts. These facts may be summarized as follows:

A. AS TO THE CLAIM FOR A MONEY JUDGMENT

1. The indirect payments plaintiff seeks to recover were made out of non-appropriated funds and passed on by the military clubs and messes making them to their alcoholic beverage customers.

2. These payments were directly made by suppliers to the Mississippi State Tax Commission as a condition of selling alcoholic beverages to Mississippi customers.

B. AS TO THE CLAIM THAT MISSISSIPPI'S COLLECTION OF ITS WHOLESALE MARK-UP ON SALES TO MILITARY RETAIL OUTLETS VIOLATES THE UNITED STATES CONSTITUTION

1. There is no federal legislative authority for conducting a military alcoholic beverage business free of state imposed requirements on purchases made for resale.

2. Since June 6, 1966, there has been no federal administrative authority for conducting such a business without complying with state laws controlling such purchases.

3. The transactions in question all require the transportation of alcoholic beverages within the State of Mississippi and are, therefore, subject to paragraph 2 of the 21st Amendment to the United States Constitution.

The factual grounds and legal arguments supporting

this motion are more fully set forth in the attached memorandum.

Respectfully submitted,
A. F. SUMMER, ATTORNEY GENERAL

BY:
/s/ Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General
Attorney for Defendants

/s/ James E. Williams
JAMES E. WILLIAMS
/s/ Robert L. Wright
ROBERT L. WRIGHT
Attorneys for the Mississippi State Tax Commission

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

[Filed September 28, 1971]

Now comes the plaintiffs in the above entitled action by their attorney to oppose defendants' motion for summary judgment and to move the court for an entry of summary judgment pursuant to Rule 56 of the Rules of Civil Procedure for the United States District Courts. The basis of the cross motion and the opposition to defendants' motion is that the answer to the complaint of the plaintiff by the defendant, defendants' answers to the interrogatories posed by the plaintiff, and the stipulation of facts between plaintiff and defendants indicate that the allegations set forth in the complaint of the United States of America have not been refuted, that there is no genuine issue as to any material fact, and that therefore the plaintiff, United States of America, should be granted summary judgment, and entitled to the judgment prayed for in the complaint as a matter of law.

The issues upon which the cross motion of the plaintiff for summary judgment is based may be particularized as follows:

A. The State of Mississippi's regulatory scheme for collecting "markups" from the military clubs burdens the exercise by the United States of its constitutional powers to maintain the Armed Services.

B. The State of Mississippi through the enforcement of the "markups" imposed by Regulation 22, has unlawfully levied a tax on governmental instrumentalities of the United States.

C. The state law and its implementing regulations have no force and effect in areas over which the United States Government has acquired exclusive jurisdiction (Keesler Air Force Base and United States Naval Construction Battalion Center.)

The factual basis and substantive legal arguments and citations supporting this cross motion and opposing defendants' motion are more fully set forth in the attached memorandum of law in support of plaintiff's cross motion for summary judgment and in opposition to defendants' motion for summary judgment.

Respectfully submitted,
/s/ Robert E. Hauberg
ROBERT E. HAUBERG
United States Attorney
Southern District of
Mississippi
Jackson Division
By: /s/ Joseph E. Brown, Jr.
JOSEPH E. BROWN, JR.
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

[TITLE OMITTED IN PRINTING]

[Filed September 22, 1971]

STIPULATION OF FACTS BETWEEN PLAINTIFF UNITED STATES OF AMERICA AND DEFENDANTS STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

The plaintiff United States of America and defendants State Tax Commission of the State of Mississippi, et al., herein stipulate that the following facts are true and correct, without prejudice to the right of any party to object to any of said facts as incompetent, immaterial or irrelevant evidence in this case:

1. Keesler Air Force Base, the United States Naval Construction Battalion Center, Columbus Air Force Base, and the Meridian Naval Air Station are located in the State of Mississippi.

2. The four bases were purchased by the United States with the consent of the State of Mississippi.

3. The lands comprising Keesler Air Force Base at Biloxi and the United States Naval Construction Battalion Center at Gulfport, Mississippi were acquired in the following manner:

(a) *Keesler Air Force Base.* The main base, which, comprises 1,061.92 acres, was acquired as follows: 717.20 acres by letter to Governor Fielding L. Wright from Harold C. Stuart, Assistant Secretary of the Air Force, dated April 19, 1950, and acknowledged April 24, 1950 (Exhibit 1); 344.72 acres by general blank letters of acceptance as follows: (1) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War dated January 9, 1945, and acknowledged January 15, 1945 (Exhibit 2); (2) letter to Governor Thomas L. Bailey from Henry L. Stimson, Secretary of War, dated May 12, 1944, and acknowledged May 15, 1944 (Exhibit 3); (3) letter to Governor Paul B. Johnson from Henry L. Stimson, Secretary of War, dated May 26, 1943 and acknowledged June 1, 1943 (Exhibit 4).

(b) *U.S. Naval Construction Battalion Center.* The lands were acquired by Declaration of Taking filed by the Secre-

tary of the Navy in the District Court of the United States for the Southern Division of the Southern District of Mississippi, as follows: (1) *United States of America* v. *911.50 acres, more or less, in Harrison County, Mississippi, G. B. Dantzler, et al.,* Civil No. 216, filed on April 30, 1942. Jurisdiction over this property was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942, and acknowledged December 29, 1942 (Exhibit 5); (2) *United States of America* v. *2.4 acres of land, more or less, in Harrison County, Mississippi, Mrs. Anna J. Ott, et al.,* Civil No. 224, filed on November 6, 1942. Jurisdiction over this land was accepted on behalf of the United States by letter to Governor Paul B. Johnson from James Forrestal, Secretary of the Navy, dated December 14, 1942 and acknowledged December 29, 1942 (Exhibit 6). (3) *The United States of America* v. *223 acres of land in Harrison County, Mississippi, Mrs. Gladys Finston, et al.,* Civil No. 285, filed on May 5, 1943. Jurisdiction was accepted by letter to Governor Dennis Murphree from Ralph A. Bard, Assistant Secretary of the Navy, dated January 6, 1944 and acknowledged January 9, 1944 (Exhibit 7).

4. Mississippi ceded to the United States and United States accepted concurrent jurisdiction over the lands comprising the Columbus Air Force Base and the Meridian Naval Air Station.

5. The Officers' Open Mess, Noncommissioned Officers' Open Mess, and the Airmen's Club of Keesler Air Force Base; the Officers' Open Mess and Noncommissioned Officers' Open Mess of Columbus Air Force Base; the Commissioned Officers' Mess—closed, Chief Petty Officers' Mess —open, Navy Exchange Enlisted Men's Club of the United States Naval Construction Battalion Center; and the Chief Petty Officers' Mess—open, the Commissioned Officers' Mess—closed, the Commissioned Officers' Mess—open, the Navy Exchange Enlisted Men's Club, and the Centralized Package Store at Meridian Naval Auxiliary Air Station are all nonappropriated fund instrumentalities established in accordance with the pertinent regulations of the Air Force and the Navy.

6. Section 6 of the 1951 Amendments to the Universal Military Training and Service Act (50 U.S.C. App. 473) reads as follows:

> The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

7. On May 4, 1964, the Secretary of Defense issued Department of Defense Directive 1330.15, which reads as follows:

> Subject: Alcoholic Beverage Control.
> References:
> (a) Section 6, 1951 Amendments to the Universal Military Training and Service Act, 50 U.S.C. App. 473.
> (b) DoD Directive 1330.1, "Regulations for the Control of Alcoholic Beverages," December 17, 1953 (hereby cancelled).
> (c) DoD Instruction 4175.2, "Purchase of Distilled Spirits for Resale by Military Installations which are Located in Monopoly States," April 19, 1956 (hereby cancelled).
>
> I. AUTHORITY AND PURPOSE
>
> Under the authority contained in reference (a) this Directive assigns responsibility and establishes uniform Department of Defense policy governing the sale of alcoholic beverages.
>
> II. APPLICABILITY AND SCOPE
>
> The provisions of this Directive apply to all DoD components and to all persons eligible to patronize on-base outlets selling alcoholic beverages in the United States and the District of Columbia.

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III. RESPONSIBILITY

A. OFFICE OF THE SECRETARY OF DEFENSE

The Assistant Secretary of Defense (Manpower) (ASD(M)) shall be responsible for the administration of this Directive throughout the DoD.

B. MILITARY DEPARTMENTS

The Secretaries of the Military Departments shall be responsible for effectively carrying out the policies of this Directive and to make and issue implementing regulations in accordance with existing applicable laws.

IV. GENERAL POLICY STATEMENTS

A. USE OF ALCOHOLIC BEVERAGES

The established policy of the Department of Defense with respect to controlling the use of alcoholic beverages by members of the Armed Forces is to encourage abstinence, enforce moderation, and punish over-indulgence. This policy can be carried out most effectively through command supervision.

B. RESTRICTIVE CONTROLS AND AFFIRMATIVE MEASURES

1. Restrictive controls shall be established by Secretaries of the Military Department which recognize (as the primary consideration) the varying conditions and requirements of military service, yet do not discriminate against individuals in the Armed Forces by denying them the rights and privileges of other citizens.

2. Affirmative measures shall be taken, including but not limited to providing (a) character guidance, with emphasis on the harmful effects of the immoderate use of alcoholic beverages, using the advice and assistance of chaplains, and (b) wholesome recreation, entertainment, and relaxation for individuals in the Armed Forces both on and off station, using the initiative and assistance of local communities and national organizations.

C. COOPERATION

1. DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this Directive. However, the purchase of all

alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered, without regard to prices locally established by state statute or otherwise.

2. This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to state control.

V. AUTHORIZED SALES

A. OTHER THAN PACKAGED ALCOHOLIC BEVERAGES

Appropriate regulations controlling the sale of alcoholic beverages dispensed by the drink, or beer sold in other than sales outlets for packaged alcoholic beverages, may be promulgated by the Secretaries of the Military Departments.

B. SALES OUTLETS FOR PACKAGED ALCOHOLIC BEVERAGES

The sale of packaged alcoholic beverages, other than beer, may be authorized on military installations when the Secretary of a Military Department approves the establishment of such sales outlets after determining that the authorization will be beneficial to the morale of the military community.

1. In arriving at such determinations, the Secretary of a Military Department will take cognizance of all pertinent factors including the following criteria as applicable:

(a) Estimated number of authorized patrons per outlet if granted.

(b) Importance of estimated contributions of package store profits to providing, maintaining and operating clubs, messes and other recreational activities.

(c) Availability of wholesome family social clubs to military personnel in the local civilian community.

(d) Geographical inconveniences.

(e) Limitations of non-military sources.

(f) Disciplinary and control problems due to restrictions imposed by local law and regulation.

(g) Highway safety.

(h) A digest of the attitudes of community authorities or civic organizations toward establishment of a package sales outlet.

2. An information copy will be dispatched to the ASD (M) of each action approving the establishment of sales outlets for packaged alcoholic beverages, including the determinations and findings made in accordance with the criteria as stated above.

3. *Controls*

(a) Purchase and consumption

Although individual rationing will not be required, installation commanders will maintain a continuing review of the amount of alcoholic beverages purchased in the sales outlets and the number of authorized purchasers. If such review indicates that the purchases equated to the number of authorized individuals results in an excessive per capita amount, appropriate control measures will be instituted to assure compliance with Section IV.A or V.B.3.c. as applicable.

(b) Pricing

Prices in authorized sales outlets for packaged alcoholic beverages shall be within ten per cent (10%) of the lowest prevailing rates of civilian outlets in the area. Exceptions will be granted only upon approval by the Secretary of the cognizant Military Department upon a substantiated showing, to be made in each case, that special factors warrant an exception thereto.

(c) Diversion

Diversion, to unauthorized persons of packaged alcoholic beverages purchased by members of the Armed Forces in authorized sales outlets, is a serious offense and where substantiated will be punished.

4. *Eligibility for patronage of sales outlets*

Eligibility for patronage of sales outlets for alcoholic beverages on military installations will be restricted to authorized personnel prescribed by the Secretaries of the Military Departments.

VI. IMPLEMENTATION

Within thirty (30) days from the date of this Directive, the Secretaries of the Military Departments shall submit to the ADS (M) for approval their proposed implementing regulations.

VII. CANCELLATIONS

References (b) and (c) are cancelled.

8. On June 9, 1966, the following change 1 to Directive 1330.15 was issued:

> The following pen change to DoD Directive 1330.15, 'Alcoholic Beverage Control,' May 4, 1964, has been authorized, *effective immediately:*
>
> *PEN CHANGE* to *Page 2, Section IV.C.1:* Delete the last clause reading as follows: 'without regard to prices locally established by state statute or otherwise.'

9. The following memoranda and letter are certified true copies from the official files of the Department of Defense relating to said Directive of June 9, 1966:

(a) Memorandum For Secretaries of the Military Departments from Thomas D. Morris, Assistant Secretary of Defense (Manpower), dated April 15, 1966 (Exhibit 8);

(b) Memorandum For: Assistant Secretary of Defense (Manpower) from Robert H. B. Baldwin, Under Secretary of the Navy, dated April 22, 1966 (Exhibit 9);

(c) Memorandum For: Assistant Secretary of Defense (Manpower) from Arthur W. Allen, Jr., Deputy Under Secretary of the Army (Manpower), dated April 26, 1966 (Exhibit 10);

(d) Memorandum For The Assistant Secretary of Defense (Manpower) from Norman S. Paul, Under Secretary of the Air Force, dated April 26, 1966 (Exhibit 11);

(e) Memorandum for Mr. Morris from Stephen S. Jackson, dated May 3, 1966 (Exhibit 12);

(f) Memorandum for The Deputy Secretary of Defense from Thomas D. Morris, dated June 8, 1966 (Exhibit 13);

(g) Memorandum For The Assistant Secretary of Defense (Administration) from the Deputy Secretary of Defense, dated June 9, 1966 (Exhibit 14);

(h) Letter to Mr. Charles B. Buscher, Executive Di-

rector, National Alcoholic Beverage Control Association, from Thomas D. Morris, dated June 27, 1966 (Exhibit 15).

10. Mississippi's Local Option Alcoholic Beverage Control Law, Mississippi Code (1942) Annotated, Section 10265-01 *et seq.*, enacted July 1, 1966, a true copy of which is attached hereto as Exhibit 16, imposes regulatory control of alcoholic beverages within the State and vests the administration of these provisions in the Alcoholic Beverage Control Division of the Mississippi State Tax Commission.

11. The Alcoholic Beverage Control Division promulgated Regulation No. 22, entitled "Sales to Military Post Exchanges, etc., Effective September 1, 1966," which reads as follows:

REGULATION No. 22

SALES TO MILITARY POSTS EXCHANGES, ETC. EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%.

This was reissued, without substantial change in content, as Regulation No. 30, dated September 14, 1970.

12. The nonappropriated fund instrumentalities enumerated in Paragraph 6, hereof, elected to purchase all of

their alcoholic beverages directly from distillers or suppliers. Under protest, but pursuant to Regulation No. 22 (now Regulation No. 30), they paid the aforementioned markups to the distillers and/or suppliers, and said distillers and/or suppliers collected the markups and remitted them directly to the Mississippi Alcoholic Beverage Control Division.

13. The Alcoholic Beverage Control Division maintains a wholesale warehouse for the distribution of alcoholic beverages as a service to purchasers. The wholesale services and facilities are available both to the military and other purchasers. The Division is required by law to maintain these facilities whether they are utilized or not. In instances where the nonappropriated fund instrumentalities listed the Paragraph 6, hereof, make purchases of alcoholic beverages direct from distillers located outside the State of Mississippi with shipment being made direct to said organizations, the Division does not transport, store, distribute or perform any other direct service connected with the purchases.

14. By letter dated May 23, 1967 addressed to "All Firms Selling Alcoholic Beverages to the State of Mississippi," the Mississippi Alcoholic Beverage Control Division informed such firms as follows:

Subject: Sales to Military Post Exchanges, Ship Stores and Officers Clubs.

You are hereby advised that the following Regulation issued under authority granted by HB 112, laws of 1966, *has not been suspended or amended,* therefore, all provisions remain in force and shall be strictly adhered to:

REGULATION No. 22

SALES TO MILITARY POST EXCHANGES, ETC. EFFECTIVE SEPTEMBER 1, 1966

Post Exchanges, Ship Stores and Officers Clubs located on military reservations and operated by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller, or by making purchases from the Alcoholic Beverage Control Division of the State Tax Commission. In the event that an

order is placed by such organization directly with a distiller a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organization shall bear the usual wholesale mark up in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller which shall in turn remit the wholesale mark up to the Alcoholic Beverage Control Division of the State Tax Commission.

The wholesale mark up on distilled spirits is 17%. The wholesale mark up on wine is 20%."

Any supplier who fails or refuses to strictly observe the above Regulation shall be considered as having violated the Alcoholic Beverage Control laws of Mississippi and promptly deprived of the benefits of same; and in addition thereto may be prosecuted for violating the act and subject to the penalties set forth therein.

Submitted by:

/s/ A. V. BEACHAM, M.D.,
A. V. BEACHAM, M.D., *Director.*

cc: Commanders of Military Posts located in Mississippi

(Underscoring so in original).

15. By letter dated June 8, 1967, addressed to "Alcoholic Beverage Suppliers," on the subject of "Compliance With Alcoholic Beverage Control Regulation No. 22—Sales To Military Officers Clubs, Post Exchanges, Ships Stores, Etc.," the Mississippi Alcoholic Beverage Control Division informed such suppliers as follows:

> Gentlemen: The mark-up regulatory fee required by the subject regulation must be remitted directly to this Division on the date shipments are made to the Military base. Said fee must be invoiced to the Military and collected directly from the Military (Club) or other authorized organization located on the Military base. Any supplier who ships or sells alcoholic beverages to Military organizations located within the boundaries of Mississippi without immediately remitting the fee directly to the Alcoholic Beverage Control Division of the State Tax Commission and collecting said fee directly from the said Military organization shall be in violation of the Alcoholic Beverage Control laws and regulations issued pursuant thereto. Payments by the Military organizations into an escrow account in lieu of payment to the suppliers have not been approved by the State of Mississippi and any such payments permitted by the suppliers shall subject such suppliers to penalties as provided by law and regulations. In addition to penalties imposed by law, products presently sold by the Alcoholic Beverage Control Division *will be delisted.*
>
> If this letter is not completely and perfectly clear we strongly suggest that you contact this office prior to accepting further orders.
>
> Yours very truly,
>
> /S/ A. V. BEACHAM, M.D.,
> A. V. BEACHAM, M.D., Director,
> Alcoholic Beverage Control Division,
> State Tax Commission.
>
> AVB:am
> (Underscoring so in original).

16. The Alcoholic Beverage Control Division initially sought to require the said nonappropriated fund instrumentalities to obtain an alcoholic beverage permit from the Division as a condition to purchasing and selling alcoholic beverages in the State of Mississippi. After their refusal to obtain such permit, the Division made no further effort to enforce this requirement.

17. The amount of the markups paid by the affected nonappropriated fund instrumentalities to suppliers outside the State of Mississippi and remitted by them to the Mississippi Alcoholic Beverage Control Division has totalled $648,421.92 from September 1966 through July 31, 1971.

18. The following Directives, Regulations and Manuals govern the operation of the clubs and other nonappropriated fund instrumentalities of the Air Force and Navy:

Department of Defense Directive No. 1330.15 dated May 4, 1964, as revised June 9, 1966, and applicable to the nonappropriated fund instrumentalities of all military departments (Exhibit 17);

Air Force Regulation 34-57, dated December 22, 1970, entitled, The Control of Alcoholic Beverages: Their Procurement, Sale and Use, with Change 1, dated March 25, 1971 (Exhibit 18);

Air Force Regulation 176-1, dated July 30, 1968, entitled, Nonappropriated Funds: Basic Responsibilities, Policies, and Practices, with Changes 1, 2, 3, 4, 5, 6, and 7 (Exhibit 19);

Air Force Manual 176-3, dated May 12, 1971, entitled Nonappropriated Funds: Operational Manual for Open Messes and Other Sundry Associations (Exhibit 20);

Navy regulations contained in the Manual for Messes Ashore, 1962, with Changes 1 through 6 (NAVPERS 15951) (Exhibit 21.).

19. The net profits earned by the aforesaid nonappropriated fund instrumentalities listed in Paragraph 6 of this stipulation, from the sale of alcoholic beverages for the calendar year 1969 and fiscal year 1971, and the use made thereof, were as follows:

(1) *Keesler Air Force Base:* Officers' Open Mess: 1969—$51,542.10; 1971—$12,554.78. Used for general maintenance of the club. NCO Open Mess: 1969—$55,348.55; 1971—$20,684.08. Used for general maintenance of the club and purchase of equipment.

(2) *Columbus Air Force Base:* Officers' Club: Fiscal year 1970, with beer sales included, $11,732.62; 1971—$12,654.43. Used for general maintenance of the club. NCO club: 1969—$23,241.23. Used for the general maintenance of the club. 1971—$15,864.87. Put into special reserve fund for major improvements and decorations.

(3) *U.S. Naval Construction Battalion Center:* Commissioned Officers' Mess—closed: 1971—$1,977; Chief Petty Officers' Mess—open: 1971—$17,048. Put into clubs' reserve funds and used for additions and improvements to the clubs. Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $8,113; Enlisted Mens' Club (Bar sales), $20,027. Profits were held for the club for entertainment, refurbishment and similar purposes for improving the club.

(4) *Naval Air Station, Meridian:* Enlisted Mens' Club: 1969—$12,385; 1971—Enlisted Mens' Club (Package store), $4,370; Enlisted Mens' Club (Bar sales), $12,838. Profits are held for the club for entertainment, refurbishment and similar purposes for improving the clubs; CPO Mess: 1969—$4,755.29; 1971—$6,204. Profits used to help pay wages and other mess administrative expenses; Commissioned Officers' Mess open: 1969—$14,154.45; 1971—$8,620. Put in club's reserve fund and used for additions and improvements to the club.

21. The following Interrogatories to the Plaintiff and the Plaintiff's Answers thereto:

"5. What, if any, reason exists why the personnel at the four military bases named in paragraph 6 of the complaint cannot supply their legitimate needs for packaged liquor by purchases from retail stores licensed by the State of Mississippi?

Answer. The nature and characteristics of military service and the circumstances and conditions governing such service cause Armed Forces personnel and their families to form their own community on the military installation and to remain separated from the surrounding civilian community. Members of the Armed Forces are subject to military discipline. Their place of duty assignment and hours of duty are fixed on the basis of the needs of the service and not upon personal preferences of the individual. Because they share the same outlook and the same working and living conditions, Service families look to each other and to the installation to which they are assigned for the satisfaction of their duty and off-duty needs.

The clubs, including their packaged liquor stores, furnish a necessary and important service to Armed Forces personnel and their families. They provide convenient facilities for off-duty dining, entertainment, relaxation and amusement. To the military community, they are the counterparts of similar facilities that are available to civilians in the civilian community.

Because they are conveniently located, are oriented to the special needs and circumstances of Service families, and are a particular earmark of military life, they contribute to the establishment and maintenance of Service morale and esprit de corps."

"6. What if any, reason exists why the alleged Federal instrumentalities named in paragraph 6 of the complaint cannot supply the legitimate needs of the aforesaid personnel without avoiding payment of the

wholesale markup on packaged liquor required by the State of Mississippi as to all packaged liquor sold in the State?

Answer: Members of the Armed Forces are stationed at installations and transferred therefrom as the needs of the Service dictate, and not on the basis of personal preferences. Because of these circumstances, it is desirable from a morale standpoint that each installation furnish substantially similar off-duty facilities for its military community, including clubs, packaged liquor stores, etc. This policy aids in easing the burden and inconvenience of transfers of personnel from one installation to another.

The 17 or 20 per cent wholesale mark up on liquor in Mississippi has a substantial effect on the price at which it can be sold on the installation. No other State has such a requirement. If the wholesale mark up is paid by clubs at installations in Mississippi, their resale prices would be higher than at clubs located on installations in other States throughout the country. It would be one factor which would make service at installations in Mississippi less attractive than in other States and would detrimentally affect the morale of Armed Services personnel transferring to installations in the State of Mississippi."

/s/ Meyer Scolnick
MEYER SCOLNICK
Attorney for the Plaintiff, United States of America.

/s/ Guy N. Rogers
GUY N. ROGERS
Assistant Attorney General for the State of Mississippi.

/s/ Robert L. Wright
ROBERT L. WRIGHT
Attorney for Defendant, State Tax Commission of the State of Mississippi.

BEST COPY AVAILABLE

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

[seal]

15 April 1966

MANPOWER

MEMORANDUM FOR Secretaries of the Military Departments

Recently, at their request, I conferred with the representative of the Association of Control States and members of the State Control Boards of several States. Mr. Charles B. Buscher, Executive Director of the National Alcoholic Beverage Control Association, Inc., requested that the Department of Defense policy concerning control of alcoholic beverages be changed to provide that military installations located in Control States would purchase their alcoholic beverages from the State wholesale distributors. He stated that all of the Control States except Montana and Oregon have now amended their laws to permit a discount to the military installations. This was strongly endorsed by all of the State representatives present at the meeting, and assurances were given that they would negotiate with the military installation representative and agree to a price which would result in a fair and reasonable profit to the installations. This was urged as a means of effecting better control of alcoholic beverages in their States and minimize alleged diversion to unauthorized persons.

It was also brought out at the hearing that a bill had been submitted by the Association and introduced in Congress which would compel the installations in the Control States to purchase the liquor from these States. They further stated that they would much prefer to work out an agreement with the Defense Department as indicated above rather than press for the bill. Failing to secure such agreement, they indicated that they would seek to have the bill passed by the Congress and said they were confident that sufficient support could be elicited to attain passage. After a full discussion, I advised them that I would look into the matter further.

Before any conclusion is made with respect to this proposal, I would appreciate your comments on the following statement which if approved will be reflected in the present DoD Directive.

"In all of the seventeen (17) Control States, frequently referred to as Monopoly States, except Montana and Oregon, military installations located within such States having separate package liquor stores on said installations will not purchase alcoholic beverages from any source other than the State wholesale distributors until they have contacted the appropriate officials within the State and undertaken negotiations as to price. If a mutually agreed upon price has been arrived at, the installations will purchase their alcoholic beverages exclusively from the State. Where there is no package liquor store on an installation, the foregoing is optional and the purchases may be made from other sources providing deliveries can be made to the installation in consonance with the law.

Since price is only one factor in determining the most advantageous contract for the Government, a price which is mutually agreed upon and which results in an adequate profit to the installation is a satisfactory implementation of the policy of Section IV.C.1 of DoD Directive 1330.15 even though a lessor price might be secured from a private source outside of the State involving inconvenience inherent in transactions and shipments from a distant source."

Your comments are requested not later than 22 April 1966.

Thomas D. Morris

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20350

[seal]

22 April 1966

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

Subj: Proposed change to Department of Defense Directive No. 1330.15 (Alcoholic Beverage Control)
Ref: (a) ASTSECDEF (Manpower) memo of 15 Apr 1966
Encl: (1) Purchasing of distilled spirits from monopoly states
(2) Potential additional costs to Navy and Marine Corps Messes in Maine, New Hampshire, North Carolina, Pennsylvania, and Virginia

Reference (a) advised that the National Alcoholic Beverage Control Association had requested that the Department of Defense require that military activities in control states (the seventeen "monopoly" states) purchase their alcoholic beverages from the State liquor authorities. It was alleged that this would result in better control of alcoholic beverages in these States and minimize alleged diversion to unauthorized persons.

This Association has made similar requests several times in the past. However, in sympathy with strong objections from the military services, acquiescence has not been granted. The Secretary of the Navy again objects to submitting to the request of this Association, the membership of which is composed of ABC Board members in the seventeen control states. Furthermore, it is highly doubtful that legislation subjecting Federal Government instrumentalities to the state controls proposed by the Association would advance any further this year than it has in past years.

In accordance with sound business practices, most Navy Messes and Clubs have for over thirty years been purchasing their alcoholic beverage requirements directly from prime sources, the distillers. Distillers' representatives make frequent calls, give advice and assistance, and expedite shipments directly from the factory or regional warehouses. Prices are at or near the minimum prices paid by

the control states, and these very reasonable prices apply to all orders regardless of size. It would be impossible to have any lower prices or any more convenient method of purchase than this.

Military activities enforce strict regulations to preclude diversion to unauthorized purchasers. The decalcomanias provide positive identification of each and every bottle; the signed sales slip with pledge not to resell is a further check. The 1964 DOD regulation establishing military package store sales prices within 10% of outside prices further minimizes the temptation to engage in illicit commerce. There is no evidence that there are any better "controls" in the States of Oregon, Washington, and Michigan (where we are now forced to buy from State stores) than elsewhere. On the contrary, those States exact a markup of from 30 to 70% over the cost to military activities elsewhere. This increases the operating costs of the Messes and Clubs in those States by a tremendous amount. The results are high prices of drinks and packaged goods to military personnel, lack of profits for Mess maintenance and improvements, and a deleterious effect upon military morale.

Enclosure (1) delineates today's purchasing procedures in the control states, based upon data provided by the Distilled Spirits Institute. Discounts to the military from the State store retail price are: Michigan, 22% and without tax of 8%; Oregon, none; Washington, 27%. Thus, the net markups over costs to State stores imposed upon military Messes are estimated to be: Michigan, about 30%; Oregon, about 70%; and Washington, about 45%.

If it were assumed that we could reach price agreements with the other five control states in which Navy and Marine Corps activities are located and if these State Control Boards offered a markup of only as little as 30%, the additional annual costs to the fourteen Navy and Marine Corps activities in the five states would exceed $2,750,000. Refer to enclosure (2).

In summary, it is recommended that the proposed change to DOD Directive No. 1330.15 not be made and that the pressures from the National Alcoholic Beverage Control Association continue to be resisted strongly. Military Mess purchasing methods of long standing are in accord-

ance with the free enterprise system, sound business practices, and DOD purchasing policies. The proposed change would provide no advantages to the military. The increased costs would be extremely detrimental to morale.

/s/ Robert H. B. Baldwin
ROBERT H. B. BALDWIN
Under Secretary of the Navy

Purchasing of Distilled Spirits from Monopoly States

State	State Liquor Board Markup on Cost	Discount to retail licensees	How Purchased Now by Military Activities
Alabama	68.0%	5%	Shipments to military from outside state are permitted.
Idaho	66.5%	5%	Unknown.
Iowa	50.9%	?	Shipments to military from outside state are permitted.
Maine	45.5%	?	Navy receives all shipments from outside state. No objections.
Michigan	63.2%	12½% not including 8% tax	Military activities must buy from State liquor stores. Discount is 22% not including 8% tax.
Montana	60.5%	?	Unknown.
New Hampshire	32.1%	5%	Navy receives all shipments from outside state. No objections.
North Carolina	42.5%	No on-sale licenses	Shipments to military from outside state are permitted.
Ohio	50.3%	10%	Shipments to military from outside state are permitted.
Oregon	69.5%	?	Military activities must buy from State liquor stores, with standard markup and no discount at all.
Pennsylvania	79.4%	16⅔%	Navy receives all shipments from outside state. No objections except for one small base which is not fully ceded.
Utah	62.0%	No on-sale licenses	Shipments to military from outside state are permitted.
Vermont	38.4%	2%	Shipments to military from outside state are permitted.
Virginia	44.0%	No on-sale licenses	Navy receives all shipments outside state. No objections.
Washington	77.0%	17.5%	Military activities must buy from State liquor stores. Discount is 27%.
West Virginia	59.0%	No on-sale licenses	Shipments to military from outside state are permitted.
Wyoming	19.1%	?	Shipments to military from outside state are permitted.

Enclosure (1)

Potential Additional Costs to Navy and Marine Corps Messes in Maine, New Hampshire, North Carolina, Pennsylvania, and Virginia

Maine	$59,445
New Hampshire	66,015
North Carolina	406,445
Pennsylvania	426,186
Virginia	1,827,904
	$2,785,995

Enclosure (2)

DEPARTMENT OF THE ARMY
OFFICE OF THE UNDER SECRETARY
WASHINGTON, D.C. 20310

[seal]

26 April 1966

MEMORANDUM FOR: ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

SUBJECT: Alcoholic Beverage Procurement

This memorandum provides comments on the changes to DOD Directive 1330.15 proposed in your memorandum of 15 April 1966, which would encourage procurement of alcoholic beverages by the military services from wholesale distributors of the Control or Monopoly States, except Montana and Oregon.

The net effect of the policy change would be to encourage procurement of alcoholic beverages in fifteen (15) states, at prices established by the states, instead of in a competitive, free market. This would reduce the margin of allowable profit accruing to officers' and NCO open messes, or otherwise require selling price increases. The proposal is contrary to the current policy that procurement by nonappropriated fund activities shall be in the open market, to the best advantage of the procuring activity, and by a method of purchase deemed to be the most favorable to the Government. There would be no objection to a provision whereby the wholesale distributors of Control (Monopoly) States would be given the opportunity to quote prices in free competition with private supply sources.

It is strongly recommended that the proposed change to DOD Directive 1330.15 quoted in your memorandum not be adopted. As an alternative, the following change is proposed:

> "It is the policy of the Department of Defense that alcoholic beverages procured for sale and consumption in authorized resale outlets pursuant to this Directive, be procured at the lowest prices, irrespective of source, consistent with the preferences of authorized patrons. Additional transportation and handling costs of procurement from a distant supply source, should be considered in order to insure that the landed cost at the point of sale is in fact the lowest cost of goods sold.
>
> "Procurement officers within the United States will obtain quotations from the wholesale distributors of Control (Monopoly) States in which delivery is to be made, in determining the most advantageous source of alcoholic beverages procured for sale and consumption at Armed Services installations."

/s/ Arthur W. Allen, Jr.
ARTHUR W. ALLEN, JR.
Deputy Under Secretary of the Army
Manpower

DEPARTMENT OF THE AIR FORCE

WASHINGTON

OFFICE OF THE UNDER SECRETARY

April 26, 1966

MEMORANDUM FOR THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER)

SUBJECT: Procurement of Alcoholic Beverages in Control States

Reference is made to your memorandum of 15 April 1966 concerning the above subject.

The proposed addition to DOD Directive 1330.15 strongly implies that non-appropriated fund activities should buy alcoholic beverages from state wholesale distributors in the specified states even though their prices may be higher than prices on the open market. Economically operated open messes are among the most important fringe benefits which contribute to our retention program.

The Air Force opposes any directive which would restrict negotiating for the best possible price consistent with the laws of the various control states. We believe that DOD should take no action to limit the gains which could accrue to the best advantage of non-appropriated fund activities, including open messes. In its' non-appropriated fund procurements the Air Force, as a general rule, prefers to follow the Armed Services Procurement Regulation policy of maximum competition. We believe that the proposed addition to the Directive would not be consistent with the principle that all procurements should be on a competitive basis to the maximum practicable extent.

At the present time there are differing agreements with the various states. In some instances states permit the Air Force non-appropriated fund activities to make the most profitable arrangements for the purchase of alcoholic beverages from wholesalers. Others are much more limiting and it appears that the Association of Control States desires to impose greater limitations and to force us to buy from the control states even when their prices are not competitive.

We believe the proposed directive would confuse the issue and set the stage for further controversy.

We recognize that the proposed directive is designed to prevent legislation which would require our non-appropriated fund activities to purchase from certain state wholesalers regardless of price. We do not believe the revised directive would over a long period of time preclude an attempt at such legislation. Nevertheless, if legislation is pursued by the interested states, the DOD should oppose it. There is a good chance the legislation will not be pursued, or if pursued, will not be enacted.

For the above reasons, the Air Force believes the proposed statement should not be incorporated into DOD Directive 1330.15.

/s/ Norman S. Paul
NORMAN S. PAUL
Under Secretary of the Air Force

ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

3 May 1966

[seal]

MANPOWER

MEMORANDUM FOR MR. MORRIS

SUBJECT: Proposal of the Control States Association

In view of the strong opposition of the Department of the Navy and Air Force, it is recommended that this office not approve the proposal submitted to the Military Departments for coordination by this office. While the Army's report also opposes the proposal as submitted, it does recommend a substitute. While this counter-proposal is a satisfactory one, if it were decided to make such a change in the Directive, it would undoubtedly meet the same opposition from the other Departments as the proposal that was sent to them for coordination.

As an alternative, it is recommended that the Directive be changed to delete the last clause in Section IV.C.1 of the Directive which states, ". . . without regard to prices locally established by state statute or otherwise." As you recall, this clause was specifically objected to by the Chairman of the Pennsylvania Alcoholic Beverage Control Board. Its deletion would not require negotiation with the Monopoly States' authorities nor would it preclude it. If you agree, I think we could expeditiously get at least a "no objection" from the other Military Departments. I have discussed this, together with other factors involved, with General Lampert and he concurs in this suggestion, subject to your approval.

If you approve, I will prepare the necessary papers to effect this, including a letter to Mr. Buscher.

/s/ Steve
STEPHEN S. JACKSON

8 JUN 1966

MEMORANDUM FOR THE DEPUTY SECRETARY OF DEFENSE

Several representatives of the Control States Association and the Executive Director of the National Alcoholic Beverage Control Association met with me recently at their request. All of the members complained of alleged diversion of alcoholic beverages to unauthorized persons in their states. They urged that the Department of Defense require that military installations located in Control States purchase their alcoholic beverages exclusively from the state wholesale distributor. They pointed out that 15 of these states had modified their laws to give discounts to the military and that they would negotiate and agree to prices which would result in a fair and reasonable profit to the installations. This was advocated as a means of effecting control and preventing diversion. It was proposed as an alternative to legislation submitted by them to Congress which would require all purchases to be made from the Control States. Although alleging widespread diversion, they declined to give information which would permit an investigation and appropriate action if substantiated.

I sent a memorandum to the three Secretaries emphasizing the necessity of persistent monitoring of the DoD policy and Service regulations designed to prevent diversion to unauthorized persons.

This was followed by a memorandum from this office outlining the proposal and requesting comments. The Air Force and the Navy reported unqualified opposition to it. The Army objected to it but proposed an alternative which would require procurement officers for installations within the Control States to obtain quotations of prices which would be considered along with the prices from other sources.

In lieu of the proposal submitted to the Department, I suggest the following change in our Directive, a copy of which is attached. On page 2, Section IV.C.1, delete the last clause, ". . . without regard to prices locally established by state statute or otherwise." While I am sure the Control States would want to go much further, this lan-

guage was particularly objected to by the Chairman of one of the Alcoholic Beverage Control Boards.

Its deletion would not require nor would it preclude negotiation with the states for the most advantageous contract to the Government.

Informal coordination with the three Departments resulted in approval by Navy and Air Force. The Army non-concurs on the basis that deletion could be misunderstood and might result in litigation. AGC(M) has no objection to the suggested change to the Directive. He notes that the legal posture of DOD would not be affected.

Recommend signature of the attached memorandum.

Thomas D. Morris

Attachments
2nd page revised by LtGenJBLampert/vlm/7Jun66
cc: OASD(M) Files
ASD(M)

9 JUN 1966

MEMORANDUM FOR The Assistant Secretary of Defense (Administration)

SUBJECT: Deletion of Clause in DoD Directive 1330.15, May 4, 1964

Please amend DoD Directive 1330.15 by making the following deletion:

Page 2, Section IV.C.1, the last clause

"without regard to prices locally established by state statute or otherwise."

This change is effective immediately. Action addressees should be requested to submit two copies of revised implementing regulations to the Assistant Secretary of Defense (Manpower) within thirty days.

Deputy

27 JUN 1966

Mr. Charles B. Buscher
Executive Director, National Alcoholic
Beverage Control Association
1000 Connecticut Avenue
Washington, D. C. 20036

Dear Mr. Buscher:

I regret the delay in sending this letter due to matters of paramount importance, including a trip to South Vietnam.

Since my conference with you and the members of your Association, I have studied the comments of the military departments on the proposal recommended by your group. I have also given careful consideration to the allegations of widespread diversion to unauthorized persons of alcoholic beverages purchased at military outlets.

As to the matter of diversion, I can assure you that this is a matter of continuing supervision in all of the military departments through the chain of command from the Secretary to the field. I know that the Secretaries of the military departments have recently addressed themselves to this matter of possible diversion. I am enclosing a recent Newsletter from the Navy. I should point out that we can act on specific allegations of diversion by authorities of an Alcoholic Beverage Control Board only if such details are revealed that would permit Departments to take appropriate action.

As to your proposal, the opposition from the Services is such as to convince me that its adoption is not in the best interest of the military departments.

However, in our desire to cooperate with the sovereign states of the Control Group, we have decided to delete the last clause in Section IV.C.1. of DoD Directive 1330.15 (attached). This would meet the specific objection of your group as submitted by the Chairman of the Pennsylvania ABC Board. It would also remove any possible implication that negotiation with a state official must be avoided.

Sincerely,
Thomas D. Morris

SSJackson/gsc/jg/18 Jun 66
3D-281/79158

Enclosures
(M) Chron File
(M) Reading File
Mr. Jackson

SUPREME COURT OF THE UNITED STATES

No. 72-350

UNITED STATES, APPELLANT,

v.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

APPEAL from the United States District Court for the Southern District of Mississippi.

The statement of jurisdiction in this cause having been submitted and considered by the Court, probable jurisdiction is noted.

November 13, 1972

United States District Court, Southern District of Mississippi, Jackson Division

Civil Action No. 4554

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI; ARNY RHODEN, CHAIRMAN; JIMMIE WALKER, EXCISE COMMISSIONER; WOODLEY CARR, AD VALOREM COMMISSIONER; KENNETH STEWART, DIRECTOR OF THE ALOCOHOLIC BEVERAGE CONTROL DIVISION, MISSISSIPPI STATE TAX COMMISSION; A. F. SUMMER, ATTORNEY GENERAL STATE OF MISSISSIPPI; AND THE STATE OF MISSISSIPPI, DEFENDANTS

Supplemental Stipulation

It is hereby stipulated between counsel for the Plaintiff and for the Defendants, respectively, that the two printed pages attached to this stipulation are true copies of the pages of the Navy Exchange Manual that contain the sections cited in the briefs on remand. These are, section 2634 Sales and Use Taxes, cited at page 5 of the Defendants' brief and at pages 19–20 of the Plaintiff's brief; and sections 2614 State and Local Taxes 2632 License Taxes, 2633 Property Tax, 2635 Other Excise Taxes and 2636 State and Local Income Taxes, cited at page 20 of the Plaintiff's brief.

WILLIAM H. FRAKE,
Counsel for Plaintiff.
ROBERT T. WRIGHT,
Counsel for Defendant.

PART F—TAXES

SECTION I GENERAL

2611 SCOPE

The treatment of taxes in this manual is limited to the application of federal, state, and local taxes to Exchange activities which operate with non-appropriated funds. Since the rates of tax are changed frequently, they are not given. All questions relating to any tax will be referred to the Navy Resale System Office.

2612 LEGAL STATUS

Exchange activities, as stated in par. 1212, are instrumentalities of the Government, deemed essential for the performance of governmental functions, and are entitled to whatever immunities the Department of the Navy may have under the Constitution and statutes. The Supreme Court has held that Army Post Exchanges are governmental instrumentalities. (Standard Oil Co. of California vs. Johnson, 316 U.S. 481 (1942)). This ruling, by analogy, applies equally to Navy Exchanges.

2613 FEDERAL TAXES

The Federal Government may tax itself or its instrumentalities if it so desires. However, the intent to do so must be stated clearly in the applicable Federal tax statute. Exchanges, therefore, are not subject to a Federal tax, unless the statute imposing it provides expressly that it applies to Exchanges or to instrumentalities of the Federal Government. Examples of specific Federal taxes made applicable to Exchanges are the Federal Occupational Taxes and the Social Security Taxes.

2614 STATE AND LOCAL TAXES

The taxing authorities of a state, territory, the District of Columbia, or a locality may not impose any tax directly upon the U.S. Government or any of its instrumentalities, unless authorized to do so by an act of Congress. The Federal Government permits state, territory, and District of Columbia gasoline taxes upon the sale of gasoline by Exchanges to authorized patrons for their private use. For more specific applications of state and local taxes, see pars. 2631-2636.

2615 TAXES IMPOSED ON SUPPLIERS AND CONTRACTORS

Federal and state taxes may be imposed on contractors and suppliers who have dealings with Exchanges. When the legal incidence of the tax is not on the Exchange, the constitutional immunity of the Exchange as a U.S. Government instrumentality does not apply. The Exchange, in the case of a tax on contractors or suppliers, would eventually bear the economic burden of the tax in the form of increased cost of the supplies purchased, unless an exemption were provided by the taxing authority. However, this economic burden does not invalidate the tax.

SECTION II SPECIFIC FEDERAL TAXES

2621 MANUFACTURERS EXCISE TAX

1. APPLICABILITY

Exchanges located in the United States (the 50 states and the District of Columbia) must purchase articles, to which the Manufacturers Excise Tax applies, at a price inclusive of such tax. If the Exchanges import into the United States articles to which this tax applies, the Exchanges must themselves pay the tax. This tax is included in the price of the articles, or is payable by the Exchange directly, regardless of whether such articles are purchased for Exchange use or for resale. The Manufacturers Excise Tax is applicable to the following:

1. motor vehicles, parts, and accessories;
2. tires and inner tubes;
3. gasoline;
4. lubricating oil;
5. recreational equipment--sporting goods:
   fishing equipment;
   firearms, shells, and cartridges.

2. EXPORT EXEMPTION

a. Exemption From the Manufacturer. Excise Tax

Exemption from the Manufacturers Excise Tax is available with respect to the purchase of supplies for export to a foreign country or for shipment to a possession of the United States. The Internal Revenue Code presently provides that no tax will be imposed on the sale by the manufacturer of an article "for export or for resale by the purchaser to a second purchaser for export"; however, proof of such exportation or shipment to a possession of the United States will be furnished to the manufacturer within the six-month period which begins on the date of the sale by the manufacturer (or, if earlier, on the date of shipment by the manufacturer). Accordingly, purchases of taxable articles for resale in Exchanges located in foreign countries and possessions will be made on a tax exempt basis. The foregoing exemption is available whether the articles are being purchased for an Exchange's own use or for resale by the Exchange. The Exchange, as a purchaser for export, is required to register with Internal Revenue Service.

BEST COPY AVAILABLE

whether or not any of these employees hold another position with the Government with respect to which they are contributing to a retirement plan. The Social Security Act applies to the following Exchange employees:

1. civilian employees of Exchanges who are citizens of the United States, regardless of where they are employed; an individual who is a citizen of Puerto Rico, but not otherwise a citizen of the United States, will be considered, for purposes of the Federal Insurance Contributions Act Tax, as a citizen of the United States;

2. civilian employees, who are not citizens of the United States, if they are employed in the United States (the 50 states and the District of Columbia), Puerto Rico, the Virgin Islands, Guam, and American Samoa.

The Federal Insurance Contributions Act does not apply to civilian employees who are not citizens of the United States, and who are employed in foreign countries and United States possessions, other than those listed in item 2. Furthermore, the Federal Insurance Contributions Act does not apply to civilian employees of Exchanges located in Guam when the employee is a resident of the Republic of the Philippines, and has been admitted to Guam as a nonimmigrant alien, pursuant to the Immigration and Nationality Act. The Federal Insurance Contributions Act also does not apply to compensation paid enlisted personnel for voluntarily performing work outside of their regular duty hours in accordance with par. 3123.

b. Procedures The procedures applicable to Social Security Taxes are described in Chapter 5.

SECTION III STATE AND LOCAL TAXES

2631 GENERAL

The tax sources of revenue of the states, territories, the District of Columbia, and localities with which the Exchange may come in contact, can be divided, broadly, into the following categories: license taxes, property taxes, sale and use taxes, other excise taxes (beer, liquor, and tobacco product taxes), and income taxes. The applicability of the foregoing taxes to Exchanges and Exchange activities are considered in par. 2632–2636.

2632 LICENSE TAXES

1. GENERAL

State and local tax authorities may not require an Exchange to obtain a license, and to pay the tax applicable thereto, in order to carry on any of its authorized activities, unless specifically authorized by Federal statute.

2. STATE MOTOR VEHICLE REGISTRATION FEES

A state or locality may not require Exchanges to pay registration or license fees for Exchange motor vehicles.

2633 PROPERTY TAX

State, local, territory, and District of Columbia taxes which are imposed upon the owner or possessor of property may not be levied upon Exchanges.

2634 SALES AND USE TAXES

The courts have made a distinction between the "legal incidence" of a tax and its "economic burden." Thus, the courts have come to hold that a state may not impose a tax, the "legal incidence" of which falls directly upon the Federal Government or any of its instrumentalities. That means that a state may neither require an Exchange to pay a tax which is imposed directly upon it, nor require it to collect a tax imposed upon its authorized patrons. A state may, however, validly impose a tax which affects the Exchange only indirectly by increasing the cost of the supplies that it purchases. In such a case, the economic burden would eventually fall upon the Exchange, but the legal incidence would be elsewhere. Therefore, when a state imposes a tax directly upon a supplier to the Exchange and it is his obligation to collect and pay it, the tax is valid, even though the Exchange would eventually bear the burden of the tax, economically, by paying higher prices. An exception to the general rule mentioned herein was made in the case of gasoline taxes when Congress declared that the states had the right to tax directly a sale by the Exchange when gasoline is for personal use of the Exchange patron. Such tax may not be imposed directly when gasoline is sold:

1. for use in government vehicles, including Exchange vehicles;

2. for use in motor vehicles owned by and registered in the name of the American National Red Cross, when the vehicle is operated by official personnel of that organization and the vehicle is to be used solely in connection with the work of that organization for the military services of the United States.

Many states provide an exemption from their sales and use taxes to manufacturers, wholesalers, and distributors, when it involves a sale for resale. A further exemption is also provided by most states when a sale is made to the Federal Government or its instrumentalities, including military exchanges. Since state laws differ, it is incumbent upon each Exchange to find out whether an exemption is provided for its purchases, and to take advantage of any exemptions given.

2635 OTHER EXCISE TAXES (BEER, LIQUOR, AND TOBACCO PRODUCTS)

Beer, liquor, and tobacco products taxes involve considerations similar to those discussed under par. 2634, and the same general rules apply. Because these products comprise a substantial part of an Exchange's business, great care will be taken to determine whether an exemption is provided under state and local law. It should be noted that most states do provide an exemption when a sale to a military exchange is concerned.

2636 STATE AND LOCAL INCOME TAXES

1. EXCHANGES EXEMPT

Exchanges are exempt from all state and local income taxes.

2. TAX WITHHOLDING

The provisions of the Navy Comptroller Manual, relating to the withholding of income tax imposed by a state, territory, possession or local taxing authority from compensation of civilian employees, are applicable to Exchange civilian employees. Such income tax, however, will not be withheld from the compensation paid to enlisted personnel for voluntarily performing work outside of their regular working hours.

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Members of tax Commission:
Arny Rhoden, *Chairman*
Robert A. Biggs, Jr., *Commissioner*
Robert L. Vaughan, Sr., *Commissioner*

Uree Garner, *Director*
A. B. C. Division
Telephones:
Central Office 354-6282
Warehouse 354-6235

ALCOHOLIC BEVERAGE CONTROL DIVISION,
STATE TAX COMMISSION,
Jackson, Mississippi 39205, August 8, 1973.

COMMANDING OFFICER,
Keesler Air Force Base, Building 1404,
Biloxi, Mississippi.

DEAR SIR: Attached is a copy of a memorandum regarding the Mississippi Alcoholic Beverage Control Division Regulation No. 25. This memorandum has been sent to the vendors from whom merchandise is purchased for the State of Mississippi.

I am going to request that you inform your purchasing personnel of the contents of my memorandum to the vendors and will ask that they follow the instructions contained therein.

Thank you very much for your cooperation in this matter.

Very truly yours,

Uree Garner
UREE GARNER,
Director, Alcoholic Beverage Control Division.

UG/sdh Enclosures.

Members of tax Commission:
Arny Rhoden, *Chairman*
Robert A. Biggs, Jr., *Commissioner*
Robert L. Vaughan, Sr., *Commissioner*

Uree Garner, *Director*
A. B. C. Division
Telephones:
Central Office 354-6282
Warehouse 354-6235

ALCOHOLIC BEVERAGE CONTROL DIVISION,
STATE TAX COMMISSION,
Jackson, Mississippi 39205, August 8, 1973.

To: All Vendors
Attention: Control State Managers
From: Uree Garner
Subject: Regulation No. 25 "Sales to Military Post Exchanges, Etc.

Attached is a copy of Regulation No. 25. Your attention is called to the option given to post exchanges, ship stores, and officers' clubs operated by military personnel (including those operated by the National Guard). The choice is granted to the purchasing direct from the *distiller* or from the Alcoholic Bev-

erage Control Division of the State Tax Commission. Purchases are not to be placed with any other source.

Uree Garner

UREE GARNER,

Director, Alcoholic Beverage Control Division.

UG/sdh.

Supreme Court of the United States

No. 74-548

UNITED STATES, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

APPEAL from the United States District Court for the Southern District of Mississippi.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

JANUARY 13, 1975.

Mr. Justice Douglas took no part in the consideration or decision of this matter.

U.S. GOVERNMENT PRINTING OFFICE 1975—O-567-894